INDEX.

PAGE

Petition for writ of certiorari to the United States Court of Appeals, Tenth Circuit 1

Summary statement of the matter involved..... 2

Basis of the court's jurisdiction 7

Questions presented 9

Reasons relied upon for allowance of the writ.... 10

Brief in support of petition for certiorari..... 13

Statement of the case 13

Specification of errors 13

Argument and authorities 13

The opinion herein approves the loose and unsound rules adopted by the trial court, viz.: " * * that ordinarily it would be inclined to resolve the doubt against jurisdiction, but under these peculiar circumstances it was persuaded to resolve doubt in favor of jurisdiction," making Federal jurisdiction a matter, not of law, but within the discretion of the trial court* 15

Federal jurisdiction cannot rightly be premised upon the wrongful exercise of it, regardless of the lapse of time during which such jurisdiction is wrongfully exercised 17

Leave to amend motion to remand applied for immediately after technical defects were first suggested should have been granted 19

Certiorari should be granted 20

TABLE OF CASES.

Atlas Life Ins. Co. v. W. I. Southern Co., Inc., 59 S. Ct. 657, 306 U. S. 563, 83 L. ed. 987, 105 F. (2d) 668, 23 Fed. Supp. 334 18

Ayers v. Wishwall, 112 U. S. 187, 28 L. ed. 693..... 18

TABLE OF CASES—Continued.

PAGE

C., B. & Q. Ry. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521 16

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 80 L. ed. 1135 18

Norton v. Larney, 289 Fed. 395, 45 S. Ct. 145, 266 U. S. 511, 69 L. ed. 413 18

Realty Holding Co. v. Donaldson, 294 Fed. 541, affirmed 45 S. Ct. 521, 268 U. S. 398, 69 L. ed. 1014..... 18

Riggs v. Johnson County, 73 U. S. 166, 18 L. ed. 768.. 18

Royalty Service Corp. v. City of Los Angeles, 98 F. (2d) 551 .....16-17, 18

St. Louis Smelting & Refining Co. v. Nix, 272 Fed. 977 (C. C. A. 10) 16

United States, ex rel. Counsel of Keokuk, 73 U. S. 518, 18 L. ed. 918 18

United States v. Green, 107 F. (2d) 19 17

Statutes and Rules.

U. S. C. A., Title 28, Sec. 80 .....17, 20

U. S. C. A., Title 28, Sec. 723, Rule 15..... 19

U. S. C. A., Title 28, Sec. 777..... 20

Rule 38, para. 5 (b) 8

Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stats. at L. 938, 28 U. S. C. A. 347) 8

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. .....

GERALD F. UPDIKE, MRS. GRACE PEARL UPDIKE, LEON W. UPDIKE, AND JAMES M. UPDIKE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF UPDIKE AWNING COMPANY,

Petitioners,

vs.

IVAN M. WEST, J. C. DUNLAP, P. N. NACHEFF, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Respondents.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Petitioners, Gerald F. Updike, Mrs. Grace Pearl Updike, Leon W. Updike, and James M. Updike, partners doing business under the firm name of Updike Awning Company, respectfully pray certiorari to review a decision of the United States Court of Appeals, Tenth Circuit, affirming a judgment of the United States District Court for the Northern District of Oklahoma, entered in a suit in which

petitioners were plaintiffs and respondents West, Dunlap, Nacheff and National Bank of Tulsa were defendants. Respondent Bonding Company was made party after removal, and after removal the suit was dismissed by agreement as to the bank, and the questions herein affect their rights only by virtue of these circumstances.

The judgment complained of was entered in an action removed to the United States District Court from a court of general jurisdiction established under the laws of the State of Oklahoma. Petitioners contend that exclusive jurisdiction of the controversy was and is vested in the state court in which they filed the law suit; the decisions complained of hold that jurisdiction is in the federal court.

The opinion of the U. S. Court of Appeals, Tenth Circuit, which does not appear in any published reports, appears in the record herewith presented and made part hereof at pages 303 to 307; the judgment of the District Court at pages 153 to 155 thereof.

Summary Statement of the Matter Involved.

Prior to the 6th day of March, 1944, a widow and three sons operated a business partnership under the name of Updike Awning Company. They had undertaken for the United States the manufacture of war supplies, and to execute the contracts had borrowed money from the Federal Reserve Bank through its affiliate, the National Bank of Tulsa. Two of the sons had enlisted in the military service and a third was preparing to go, which circumstances, and the advanced age of the mother, made it necessary to perfect arrangements to carry on the business during the absence of the sons. With this end in view, a contract was prepared and executed (R. 15), under the terms of which the

partners turned over management of the business to Ivan M. West for a period beginning March 6, 1944, and ending, with certain immaterial conditions, April 1, 1945. Upon the same day, West in turn employed Dunlap and Nacheff as production managers of the business for the same term. With exceptions immaterial to the issues herein, West, Nacheff, and Dunlap were to be paid at the termination of the management contract.

Operating under this agreement, these three managers within the first six months reduced the firm's obligations to the federal lending agencies, from $100,000 to $53,267. The war continuing, and in anticipation that the sons would not return until after the original management contract expired, a new management contract was executed. At that time the managers represented to the partners that by April 1, 1945, there would be sufficient earnings and liquid assets available to discharge the firm's debts, and under the new contract agreed to provide operating capital beginning April 1, 1945.

On April 21, 1945, the partners filed suit in the state court against the managers and the National Bank of Tulsa (R. 1) setting forth substantially the facts hereinabove and charging that during the period of six months following the execution of the contract for extended management, the managers had fraudulently dissipated the partners' money and property, incurring and paying excessive and unnecessary charges for traveling, hotel bills, and wages; that they disbursed for auditing alone a sum in excess of $1,000 per month, had discontinued payments upon the firm's obligations, had borrowed on March 28, 1945 (before they were entitled to collect under their management contract), the sum of $25,000.00 which, to the extent of $22,500.00, they, with the full knowledge and approval of the bank, immediately con-

verted to their own use with the result that when the sons returned they found their business in the hands of a receiver.

The partners claimed damages in the sum of $75,000.00 with interest and costs.

The petition plead the substance of the three management contracts, but did not append copies.

The managers (but not the bank) joined in a petition for removal of the cause to the federal court (R. 11). The petition for removal (R. 11-28), so far as material here, averred unequivocally and in detail that federal jurisdiction existed on the ground of complete diversity of citizenship. Fraudulent joinder was alleged on the loose ground that the cause of action against West is separable as to him, "and further that said defendants Dunlap and Nacheff are improperly and fraudulently made parties defendant to this cause for the sole purpose of preventing removal * * *, which is evidenced by the fact that plaintiff did not attach copies of the said separate contracts to their petiion filed herein or otherwise refer to said written contracts which upon their face show that there was no joint cause of action." (R. 14)

To the petition for removal was attached, as Exhibit A, the agreement whereby the partners employed West, and, as Exhibit B, the agreement whereby West in behalf of the partners employed Nacheff and Dunlap, and, as Exhibit C, a letter dated the same date, from the partners to the bank respecting the two contracts. The contract for extended management executed by all the managers jointly and set forth in the petition was in no manner referred to in the petition for removal, nor was any copy of this agreement appended.

Since the removal petition asserted positively and unequivocally that neither the bank, West, Nacheff nor Dunlap were local residents, it is clear that the petition for removal did not plead facts showing a fraudulent joinder. The essence of such pleas is the improper or fraudulent joinder of *a local citizen* in an action against a non-resident to defeat federal jurisdiction. If there is, as the removing managers say, in fact *no resident defendant joined at all,* it is clear that they failed to allege facts to show federal jurisdiction on any ground except diversity of citizenship.

Motion to remand was promptly filed in the federal court (R. 30) in which the partners alleged that jurisdiction was rightly vested in the state court denied there was a diversity of citizenship, asserted that the petition for removal was insufficient to invest the federal court with jurisdiction and that the suit was not removed in the manner required by law.

Proceeding upon the theory that the only issue properly tendered by the record was that of diversity of citizenship, the trial judge, after hearing evidence upon this issue, first found as a fact that West, Nacheff and Dunlap were each and all residents of the State of Kansas.

Subsequently the partners discovered new and additional evidence to disprove the contention that the managers were all non-residents. They made application to the court and were granted leave to file a second motion to remand (R. 117). The evidence supporting this motion was so conclusive that the trial court then found as a fact that there was no complete diversity of citizenship and that federal jurisdiction on this ground did not exist. (R. 238)

However, instead of remanding the case to the state court, the trial judge overruled the motion to remand and

retained jurisdiction upon the sole ground of fraudulent joinder of West with Nacheff and Dunlap. (R. 239)

The trial judge indicated that his decision was influenced to some degree by failure of plaintiffs in their motion to remand to more specifically traverse the allegation of fraudulent joinder. (R. 238)

The partners contended that they were not required to traverse in detail a plea that was itself inadequate, or to deny what the managers had not themselves alleged.

Out of an abundance of caution, they also asked leave to amend their motion to remand to more specifically traverse the plea of fraudulent joinder.

The trial judge denied leave to amend notwithstanding the liberal provisions of the rules and the statute and the circumstance that leave to amend was sought immediately on the first occasion when any inadequacy in the motion to remand was suggested.

Prior to that date both the trial judge and the managers had proceeded in offering and receiving evidence upon the theory that fraudulent joinder was at issue under the pleadings. The managers tried but failed to establish as a fact that there was such fraudulent joinder. (R. 226-232)

The trial judge, noting the plaintiffs' contention that defendants had not alleged sufficient facts to establish the charge of fraudulent joinder, said in substance:*

> It is a rather close question. The statement in the petition for removal is not a statement of any facts from which a conclusion could be reached that there was a fraudulent joinder. Defendants rely upon failure to attach contracts which show that there was no joint cause of action. This is an action on the contracts.

---

*For full text of the judge's remarks see R. 242-246.

Under ordinary circumstances I might be inclined to resolve doubt in favor of the state court's jurisdiction, but I am persuaded to resolve any doubt I have in favor of retaining the jurisdiction because of developments since removal.

For this reason also I deny application for leave to amend motion to remand.

The jurisdiction is largely a technical proposition anyway.

If plaintiff desires I will arrange for another judge to try the case.

The case was assigned for trial. The partners elected to stand on the proposition that the federal court was without jurisdiction, declined to present further evidence and judgment of dismissal for want of prosecution was entered, from which an appeal was prosecuted to the United States Court of Appeals for the Tenth Circuit with the result heretofore stated.

Basis of the Court's Jurisdiction.

Petitioners respectfully show that they are entitled to certiorari for that:

1. That the federal court has wrongfully assumed and exercised jurisdiction of a cause of action, of which the District Court of Creek County, Oklahoma, had exclusive jurisdiction, in violation of the Constitution and laws of the United States, and the rights of petitioners thereunder; that thereby they have been deprived of property without due process of law.

2. That the Circuit Court of Appeals for the Tenth Circuit has decided an important question of federal law, the

effect of which is to deny a right to amend motion to remand which has not been but should be settled by this Court.

3. That said court has decided a federal question, *viz.*, whether doubts are to be resolved in favor of rather than against federal jurisdiction in a way in conflict with applicable decisions of this Court, and of other circuits.

4. That said court has sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's power of supervision.

Jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347) and under Para. 5 (b) of Rule 38.

The decree of the United States Court was entered October 24, 1947 (R. 153); the final opinion of the United States Court of Appeals for the Tenth Circuit, upon appeal timely prosecuted, March 7, 1949 (R. 32), and on March 16, 1949, conformable to the rules, said federal circuit by order stayed its mandate pending filing on or before April 16, 1949, of the instant proceedings.

Questions Presented.

Petitioners respectfully submit that it was error in effect for the courts below to hold:

1. That a petition for removal which denies unequivocally that any local citizen has been joined as a defendant pleads facts to show federal jurisdiction for fraudulent joinder.

2. That under the rules of civil procedure and the federal law a motion to remand could not be amended, particularly where absence of federal jurisdiction was doubtful or apparent on the face of the record.

3. That federal jurisdiction is largely a technical proposition anyhow and since a decision on this question did not dispose of the matter on the merits the error, if any, could be compensated by referring the case to another judge for trial.

4. That because of "developments" in the federal court in a removed case, doubt should be resolved in favor of rather than against federal jurisdiction.

5. That where by false assertions respecting their residence parties defendant induce the federal court to exercise unauthorized jurisdiction on the ground of diversity of citizenship, lawful jurisdiction on some other ground may stem from such wrongful exercise of it.

6. That a federal trial judge may impose arbitrary limits as to the time or manner under which absence of federal jurisdiction apparent on the face of the record may be asserted prior to judgment.

Reasons Relied Upon for Allowance of the Writ.

The decree and opinion complained of were entered in an action of which clearly the state court had exclusive jurisdiction.

The federal courts below resolved doubt in favor of federal jurisdiction. They adopted the premise that federal jurisdiction is largely technical anyhow.

Because by false allegations of residence the managers had induced the federal court to exercise jurisdiction, the court penalized the partners by compelling them to try their law suit in a forum selected by the managers, and in which the partners' right to trial by jury was doubtful.

The federal courts below either ignored or dismissed as largely technical the obvious fact that in an action instituted by plaintiffs, all of whom are admitted to be local residents, to properly plead fraudulent joinder in a petition for removal an indispensable requisite is an allegation that for some purpose at least there is a joinder of a local citizen as a defendant.

Inferences and doubts were indulged to aid vague and contradictory allegations of fraud clearly not well pleaded in a petition for removal.

The liberal rules of federal procedure permitting amendments were disregarded without just or satisfactory cause or reason, obscuring to a degree the jurisdictional issues.

The reasons assigned and the circumstances under which the Court of Appeals and the Federal District Court proceeded are novel and unusual; they constitute such a definite departure from established precedent, both in the

Tenth Circuit and elsewhere in the United States, that grave doubt and confusion will result in removed cases concerning a question of primary importance, *viz.*, whether the federal or state court has jurisdiction over the controversy. Under this precedent, jurisdiction becomes a matter not of law or right, but resting in the unlimited discretion of the trial judge. Jurisdiction will depend on which way he is inclined to resolve doubts, rather than upon the facts or the law.

The way is opened to a flood of new cases in the federal courts, for litigants will be encouraged to impose upon the jurisdiction of the federal court by false allegations respecting residence in the hope that having thus persuaded them to exercise jurisdiction for a time, they may thereby acquire jurisdiction.

The decree and decision complained of are in direct conflict with applicable provisions of the Constitution and laws of the United States and other decisions of this Court and other circuits upon the identical questions.

Wherefore, petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit.

GLENN O. YOUNG,
Sapulpa, Okla.,
Attorney for Petitioners.

April 4, 1949.

BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI.*

The petition for certiorari, *supra,* includes:

(A) Reference to the unreported opinion and judgment of the courts below, not yet officially reported, and,

(B) A concise statement of the grounds on which the jurisdiction of this court is invoked.

Statement of the Case.

The petition for certiorari contains also a concise statement of all that is material to a consideration of the questions presented, supported by appropriate page references to the printed record. Such matters are for brevity incorporated by reference.

Specification of Errors.

The errors complained of are as set forth in the petition for certiorari at page 9 under the caption "questions presented."

Argument and Authorities.

Because of their obvious nature, the errors assigned are not herein separately briefed or argued.

The cases cited by the Court of Appeals are adopted as correctly stating the law. Under these cases it was the clear duty of the Court of Appeals to reverse the decision of the trial court with directions to remand.

Apparently proceeding upon the theory that the federal court may acquire jurisdiction, like riparian owners sometimes acquire title to real property, by accretion, opposing counsel required the partners (R. 159 to 163) at

great expense to bring forward a mass of irrelevant matter, no part of which is material to any issue here or in the Court of Appeals.

While the voluminous nature of this record may tend to obscure the jurisdictional issue, scrutiny will show clearly that at the trial and in the Court of Appeals the sole issue upon which the partners stood was lack of jurisdiction in the federal court to try a law suit which they had instituted in the state court.

It will be observed that in the judgment itself, although it is recited that plaintiffs choose to stand on the issue of federal jurisdiction and request the court to consider all evidence offered on this issue, no findings are made respecting it. (R. 153)

If the question of jurisdiction, as the trial judge suggested, was largely technical anyhow, it would seem as much the right of the partners to assert state jurisdiction as it was that of the managers to select the federal forum.

It was pointed out to the court that the contract of Nacheff and Dunlap was signed by West, but this proposition the court dismissed with a statement, "That will be the order." (R. 246) Request was made to the trial court for leave to amend the answer, to plead to the jurisdiction of the court (R. 248), the judge stated: "My ruling is that I will not permit you to amend for the purpose of traversing the allegation of a fraudulent joinder." (R. 249)

An amended petition with amendments thereto filed in the federal court by leave or order of the court, other than the motions to remand, did show a good faith joinder of the defendants and did append or adopt by reference copies of the management agreements. (R. 36-45; R. 58-61)

That there was in truth no fraudulent joinder of any of the parties—not even a misjoinder—is conclusively established by noting that the case was actually treated and tried as joint cause of action after removal. There was no finding and no contention after removal that the partners had joined a fictitious party against whom they were not in good faith asserting a cause of action. The plea of fraudulent joinder in the petition for removal was a mere pretext relied upon to give color of authority to proceed in the federal court.

Certiorari should issue, it is respectfully submitted, to prevent an obvious and unwarranted usurpation of jurisdiction by the federal court in a case over which the state court had lawful jurisdiction, and to clarify and declare the law governing the right to amend a motion to remand.

The opinion herein approves the loose and unsound rules adopted by the trial court, *viz.*: " * * * that ordinarily it would be inclined to resolve the doubt against jurisdiction, but under these peculiar circumstances it was persuaded to resolve doubt in favor of jurisdiction," making Federal jurisdiction a matter, not of law, but within the discretion of the trial court.

Under the opinion herein, the Tenth Circuit approves a rule whereby the question of whether federal jurisdiction exists in doubtful cases is not one of law but a matter committed to the discretion of the trial judge. Such a rule leaves jurisdictional questions so in the realm of speculation and conjecture that it should be approved only after the most careful weighing of the consequences, and the circumstances under which doubts are to be resolved in favor of rather than against federal jurisdiction should be stated with clarity.

The "peculiar circumstance" to which reference is made must have referred to the extensive hearings resulting from the false allegation of the removing defendants that there was a complete diversity of citizenship. To say that the removing defendants may remove a case by false allegations respecting their residence, conceal the facts and deceive the court, and put their adversaries to long, tedious and expensive investigations to establish to the satisfaction of the court the falsity of such allegations, then benefit from the delay so caused, is to allow them to reap a reward for their own wrong. Surely the wrongful conduct of a defendant who seeks to establish federal jurisdiction does not justify resolving doubts in his favor.

In *St. Louis Smelting & Refining Co.* v. *Nix,* 272 Fed. 977, the Court of Appeals, Tenth Circuit, itself announced the rule that where the jurisdiction of the court appeared doubtful, the court should inquire fully into the issue, citing *C. B. & Q. Ry.* v. *Willard,* 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521. From the opinion therein we quote:

> "The question of jurisdiction in the courts of the United States, those of first instance and those of appeal, is first and fundamental. The jurisdiction of the inferior courts of the United States rests wholly upon the Acts of Congress. It cannot be conferred by consent of the parties, or by their omission to contest it, or by estoppel, and whenever it appears, as it did in this case, that jurisdiction was probably lacking, it was the duty of the court to inquire into it, regardless of the attitude of the parties."

That presumptions are *against* rather than in favor of federal jurisdiction has heretofore been regarded as axiomatic.

> "Jurisdiction of the federal courts depends on the situation as it exists at the time the suit is brought and

subsequent events neither confer nor divest it. *Mutual Life Ins. Co.* v. *Rose,* (D. C. Ky., 1923) 294 F. 122; *Cohn* v. *Cities Service Co.,* (2d Cir., 1930) 45 F. 2d 687; *Ford, Bacon & Davis, Inc.,* v. *Volentine,* (5th Cir., 1933) 64 F. 2d 800."

—*Royalty Service Corp* v. *City of Los Angeles,* 98 F. (2d) 551.

"The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record. *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327, 337, 16 S. Ct. 307, 40 L. ed. 444."

—*United States* v. *Green,* 107 F. (2d) 19.

Federal jurisdiction cannot rightly be premised upon the wrongful exercise of it, regardless of the lapse of time during which such jurisdiction is wrongfully exercised.

In this connection, it is respectfully insisted that this Court note the plain and unambiguous provisions of the governing statutes of the United States which, so far as material, read:

"If in any suit * * * removed from a state court * * * it shall appear to the satisfaction of said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court * * * the said District Court shall proceed no further therein, but shall * * * remand it to the court from which it was removed * * *."

—Title 28, U. S. C. A., Sec. 80.

This provision of the U. S. Code contains no limitation upon the time for remand of a case not properly within the

jurisdiction of the federal court. The plain provision of the code is:

> "If * * * at any time after such suit has been *** removed thereto."

Neither the code provision nor the rules, so far as counsel can discover, contain any limitation as to the time in which a motion to remand may be made. Among many cases by the Supreme Court of the United States and other federal circuits, construing the foregoing statute, attention is respectfully invited to the following: *Riggs* v. *Johnson County,* 73 U. S. 166, 18 L. ed. 768; *United States, ex rel. Counsel of Keokuk,* 73 U. S. 518, 18 L. ed. 918; *Atlas Life Ins. Co.* v. *W. I. Southern Co., Inc.,* 59 S. Ct. 657, 306 U. S. 563, 83 L. ed. 987, 105 F. (2d) 668, 23 Fed. Supp. 334; *Norton* v. *Larney,* 289 Fed. 395, 45 S. Ct. 145, 266 U. S. 511, 69 L. ed. 413.

Under these cases it is the duty of a federal court to determine the question of its jurisdiction even though the question not be raised by either party.

In the federal court it has heretofore been regarded as never too late to consider the question of the court's jurisdiction, and if at any time the want of jurisdiction is apparent the duty of the court to arrest the proceedings. *Royalty Service Corp.* v. *City of Los Angeles, supra; Realty Holding Company* v. *Donaldson,* 294 Fed. 541, affirmed 45 S. Ct. 521, 268 U. S. 398, 69 L. ed. 1014.

A case may even be remanded after hearing and final decree if the order to remand is made before the close of the term. *Ayers* v. *Wishwall,* 112 U. S. 187, 28 L. ed. 693.

From *McNutt* v. *General Motors Acceptance Corp.,* 298 U. S. 178, 80 L. ed. 1135, the following is quoted:

> "The objection that jurisdiction to entertain the

suit did not exist is one which may be taken by answer. *Anderson* v. *Watt,* 138 U. S. 694, 34 L. ed. 1078, 11 S. Ct. 449. Indeed, under Section 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not."

The same case expressly decides that in considering jurisdiction, the court is not bound by the pleadings of the parties.

Leave to amend motion to remand applied for immediately after technical defects were first suggested should have been granted.

In denying leave to amend the court stated:

"Under ordinary circumstances, I think I would permit leave to amend, particularly if the motion had been duly filed before a motion to remand was filed in this case."

The court's meaning is not clear, for obviously there would be no occasion to ask leave to amend a motion to remand before it was filed. The real reason leave to amend was denied appears revealed by the court's statement that jurisdiction is "*largely a technical proposition anyway.*" The court conceded the long delay and proceedings in the federal court were not the fault of the partners.

Aside from the rules (28 U. S. C. A. 723c, Rule 15), the federal statute contains the following further provision respecting amendments:

"No * * * declaration * * * or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed to

give judgment according to the right of the cause * * * without regarding any such defect or want of form * * * and the court shall amend every such defect and want of form, * * * and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

—28 U. S. C. A., Sec. 777.

That a motion to remand should be considered freely amendable seems sensible in view of the circumstance that neither the Code of Civil Procedure nor the federal statutes specify the manner in which questions of federal jurisdiction are to be raised. Title 28, U. S. C. A., Sec. 80.

Certiorari Should Be Granted.

The record herein discloses a grave departure from established judicial precedent in the United States. That so important a question as that of the jurisdiction of the federal court should depend upon the humor of the judge, upon the way he is inclined to resolve ill-founded doubts, is of great public moment. Whether federal jurisdiction is a question of law and fact rather than a matter of conjecture is neither a trivial nor an inconsequential nor a largely technical issue. Whether when jurisdiction is clearly not apparent from the face of the record, federal judges may ignore provisions of the rules of civil procedure and of the law to prevent challenges to their jurisdiction timely made and made in good faith are questions which, if doubtful, require a prompt and clear delineation to prevent confusion. If the principle that parties can by false allegations impose for a period upon federal jurisdiction and from this circumstance lawful jurisdiction may attach by accretion is to receive judicial sanction, the consequent increase in such

cases should be taken into account and the terms and conditions under which such federal jurisdiction will arise made clear and plain.

The petitioners believe it clearly established that they have been deprived of a right under the Constitution and laws of the United States to have their lawful claims adjudicated in a forum established by state law.

For the reasons stated, it is respectfully submitted that a writ of certiorari should issue, for they have no other recourse.

GLENN O. YOUNG,
Sapulpa, Okla.,
Attorney for Petitioners.

April 4, 1949.